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## Fighting Corruption in America and Abroad

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# SYMPOSIUM

## FIGHTING CORRUPTION IN AMERICA AND ABROAD

### FOREWORD

*Jed Handelsman Shugerman\**

In the middle of the first panel of the *Fordham Law Review* symposium, *Fighting Corruption in America and Abroad*, there was a pivotal, clarifying moment. Zephyr Teachout and Lawrence Lessig had been framing modern campaign finance as a problem of corruption—systematic and institutional corruption. Richard Hasen rejected that framing, arguing that America’s campaign finance system is not truly “corruption” in a legal sense, but rather it is fundamentally a problem of inequality. In the middle of this debate, Lessig admitted that he had been making a legal argument about corruption pitched to the courts, but that the moral question is different:

I find it difficult to look at politicians and feel the moral force of the sense that they are corrupt. I find it hard to go to Washington, meet with members of Congress, and feel the moral force of, “You are a corrupt person. What you’re doing is against the public interest.” Because when I meet these people and talk to them, they are really decent people. They’re people who, in general, think [that] what they are doing is for the public good. Now, they’re wrong about a lot of it, and they are misguided because of their obsessive focus on fundraising . . . . But what I feel [is] the moral force here, it is the inequality.<sup>1</sup>

Lessig’s concession of the gap between his legal strategy and his moral intuition was why Fordham University School of Law held a live symposium and did not just publish of a handful of related papers. The Fordham symposium brought out a spirited, provocative debate about corruption, and

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\* Associate Professor, Fordham University School of Law. This Foreword provides an overview of the symposium entitled *Fighting Corruption in America and Abroad* held at Fordham University School of Law.

1. Lawrence Lessig, Remarks at the Fordham University School of Law symposium, *Fighting Corruption in America and Abroad* (Mar. 6, 2015). He then compares the inequality of the old White Primary (racially restricted party primaries) to the new Green Primary (financially restricted party primaries). *Id.* Racial inequality is more reprehensible, but he finds both to be a sufficient basis for legal action. *Id.*

Lessig's reflection struck at one of the deeper problems with combatting corruption: How do we define corruption, and how does that definition relate to the real world fight against corruption? If we demonize corruption in the abstract in order to mobilize against it, if our image of corruption is that it is evil so that we might rally outrage against it, then what happens when we engage with the much more mundane reality of institutional corruption in the real world? We might call this problem the "banality of corruption."<sup>2</sup> What happens when good, decent, well-intentioned people are asked to play by corrupting rules? This is precisely what makes our modern campaign finance crisis so insidious. If political corruption were simply a matter of politicians getting caught on tape taking briefcases of cash from robber barons dressed like Monopoly men with monocles, top hats, and villainous laughs, then we wouldn't have any legal or moral problems cracking down. And the majority of politicians probably would have their own moral qualms about engaging in such behavior. But our banal modern campaign finance system allows well-intentioned politicians to soothe their consciences, rationalize their behavior, and rationalize this system. This more subtle corruption erodes their ethics much more gradually and insidiously.

This dissonance between the intuitive image of individual corruption—such as *quid pro quo* bribery—and the deeper structural problem of institutional corruption creates legal challenges. For example, as a matter of doctrine, the First Amendment prevails unless one can show a compelling state interest that might trump it. In order to justify campaign finance regulation, reformers follow the precedents and argue that anticorruption is a compelling state interest.<sup>3</sup> But this high-pitched rhetoric about corruption's evils often fails to match up with the everyday banality of campaign finance influence peddling. Legally, Lessig is correct that the best strategy is to portray unregulated campaign spending as corrupt, but our legal imaginations often have not adjusted to the bigger picture. We are struggling with the broader focus on campaign finance, and our legal system itself struggles with the gray areas. The Articles for this symposium each confront the problems with these gray areas in the battle against both foreign and domestic corruption. To address the reality of corruption, we need a big-picture institutional definition, but this symposium's authors wisely recognize the problems and shortcomings of such a broad definition.

The exchanges at the symposium and these Articles highlight the gap between public opinion and legal culture on the definition of corruption and the problems that flow from that gap. Teachout's and Lessig's legal argument that corruption can be institutional and banal roughly corresponds with the public's *moral* intuition. Conversely, Lessig's and Hasen's intuitive *moral* reaction—that corruption is the evil of *quid pro quo*—maps onto the

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2. Cf. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 287–88 (1963).

3. See *Citizens United v. FEC*, 558 U.S. 310, 311–16 (2010); see also *NAACP v. Button*, 371 U.S. 415, 438 (1963). See generally Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

legal conclusion of the U.S. Supreme Court in *Citizens United v. FEC*<sup>4</sup> that corruption is narrowly defined as quid pro quo. Note the reversal of moral and legal positions: Teachout and Lessig's legal argument tracks the public's moral sensibilities, while Lessig's moral intuition tracks the Supreme Court's formalism.<sup>5</sup> Legal culture certainly values precise line drawing and formalism. Does that formalism also narrow our moral intuitions? Does it make us more tolerant of institutional corruption?

These questions are one reason why Teachout's *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* is so important.<sup>6</sup> Her history demonstrates that the constitutional Framers understood that corruption could be institutional, that democratic institutions could erode gradually if they were flawed structurally, and that the Framers share this understanding with the general public today.<sup>7</sup> The lawyers' formalistic and narrow definition of corruption—embraced by today's Court—is out of step not only with modern public opinion, but also with the original understanding of the constitutional project.

This Foreword focuses on a few related observations from the symposium. First, it summarizes Teachout's book, which inspired this symposium and which relied on history to undermine *Citizens United*. Second, it suggests that a more recent case in this Court's Term, *Williams-Yulee vs. Florida Bar*,<sup>8</sup> also erodes *Citizens United*, at least a bit, by recognizing a compelling state interest in combating the appearance of corruption and bias in a new context: by embracing that corruption lurks in gray areas and the banality of campaign fundraising. Third, Pamela Karlan and Samuel Issacharoff once observed that money in politics is like water: if you stop up one stream, the money finds another way to flow.<sup>9</sup> I pick up on Albert Alschuler's critique of overbroad criminalization of corruption<sup>10</sup> to note how anticorruption reforms are also hydraulic systems: if you dam up one source of reform, you flood the other sources. The result of those dams leads to the unfair damnation of public officials who run into zealous prosecutors and a powerful political undertow. If the Court frustrates the ex ante regulation of campaign cash, then other actors will step in ex post, and often without the right role or the right fit for the structural problems. The history of campaign finance reform demonstrates this pattern of hydraulic forces and unintended consequences.

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4. 558 U.S. 310 (2010).

5. See generally *id.* (generally adopting a formalist approach in defining corruption).

6. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014).

7. *Id.* at 32–55.

8. 135 S. Ct. 1656 (2014).

9. Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1998).

10. See generally Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463 (2015).

I. TEACHOUT'S *CORRUPTION IN AMERICA*

*Corruption in America* traces the idea of “corruption” over American history from the Revolution through the present.<sup>11</sup> This is obviously an ambitious project, but Teachout succeeds by focusing on legal institutions and by writing so engagingly and accessibly. Teachout argues that Americans have a broader, more capacious definition of corruption, rather than the narrow definition the Court employs in *Citizens United*.<sup>12</sup> Corruption historically has included not only bribes and fraud, but also situations when public officials “serve private interests at the public’s expense.”<sup>13</sup> Teachout’s book is a mix of political history, legal challenge to *Citizens United*, and call for reform.

The book can be divided into four parts, each with four chapters. The first part focuses on the early Republic—how Americans then conceived of corruption as the regard for self-interest over public interest and considered it to be a national threat.<sup>14</sup> Americans contrasted their new republic with a European culture of corruption, embodied in the colorful stories of Benjamin Franklin, Thomas Jefferson, and other officials struggling over beautiful French gifts.<sup>15</sup> In the Constitution, the Framers had prohibited such gifts absent congressional approval. They embraced European notions of virtue, civic republicanism, and law, together serving as a bulwark against corruption.<sup>16</sup> They embraced Montesquieu’s structure of the separation of powers as a check against corruption.<sup>17</sup> Teachout observes that the word “corruption” was used hundreds of times in the convention and the ratification debates, but less than 1 percent of those uses were in the limited sense of quid pro quo that the *Citizens United* decision posited.<sup>18</sup> Generally, their use of the word “corruption” reflected a broader meaning of private interests and self-interest undermining public spiritedness. But she also shows how the early republic era struggled with how to define and correct corruption.<sup>19</sup>

The second part of the book turns to the nineteenth century, with Americans confronting corruption, but still having trouble defining it as a legal matter.<sup>20</sup> The most interesting observation in this section is that state legislatures initially avoided criminalizing bribery until after the Civil War, but at the same time, they resolutely prohibited lobbying as a threat to civic republicanism.<sup>21</sup> Teachout offers an intriguing interpretation for how lobbying reemerged as a legally acceptable activity in the late nineteenth

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11. See generally TEACHOUT, *supra* note 6.

12. See generally *id.* (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)).

13. *Id.* at 2.

14. See *id.* at 17–101.

15. See *id.* at 17–31.

16. See *id.*

17. See *id.* at 40–44.

18. *Id.* at 50.

19. See *id.* at 81–124.

20. See *id.* at 102–82.

21. *Id.* at 161–65.

century: the lobbyists changed their contracts to emphasize professional skills, rather than personal influence; judges' attitudes toward contracts became more laissez-faire, opening the door to a more neutral acceptance of lobbying contracts; and as free speech became a more robust legal concept, lobbying became associated with the First Amendment.<sup>22</sup> This section ends with railroads and the transformation of funding for campaign finance—changing from officeholders paying kickbacks to the party machine, to a more familiar world of corporate donations.<sup>23</sup>

The corruption of the late nineteenth century triggered a reform campaign in the early twentieth century, the topic of the book's third section.<sup>24</sup> Progressive era reformers adopted bright line rules as prophylactic protections against corruption, including the prohibition on corporate campaign spending that was eventually overturned in *Citizens United*.<sup>25</sup> In the mid-twentieth century, prosecutors creatively applied mail fraud statutes to political corruption cases.<sup>26</sup> The breadth of the statutes gave wide latitude to prosecutors and jurors to define corruption.<sup>27</sup> On top of these new tools, Watergate led to new anticorruption statutes, but also set the stage for *Buckley v. Valeo*<sup>28</sup> and the Court's equation of money with speech. Teachout critiques *Buckley*, which struck down Congress's limits on how much candidates can spend,<sup>29</sup> with an astute observation: the Court simultaneously has been narrowing its definition of corruption while broadening its definition of speech.<sup>30</sup>

In the fourth section of the book, which is a contemporary legal and policy analysis, Teachout extends this critique by emphasizing a constitutional balance of speech and equality values.<sup>31</sup> She digs deeper into Justice Kennedy's limited definition of corruption as quid pro quo.<sup>32</sup> Her research into federal and state precedents shows that this definition was exceedingly rare before 1976 and was essentially an invention of the Roberts Court.<sup>33</sup> She introduces the "anticorruption principle," which is more than simply balancing liberty with equality values;<sup>34</sup> it revives the civic republicanism and public spiritedness of the Founding era.<sup>35</sup> She concludes with a call for public financing of elections and a renewed commitment to antimonopoly and trust busting.<sup>36</sup>

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22. *Id.* at 144–73.

23. *Id.* at 174–82.

24. *See id.* at 183–226.

25. *See id.*

26. *Id.*

27. *Id.*

28. 424 U.S. 1 (1976).

29. *Id.* at 143–44.

30. TEACHOUT, *supra* note 6, at 212–13.

31. *See id.* at 227–90.

32. *Id.*

33. *Id.* at 238–39.

34. *Id.* at 276.

35. *See id.* at 276–90.

36. *See id.* at 291–305.

The book is not an archival history project, but rather a synthesis of secondary historical work with some original primary research into the Convention, ratification debates, and centuries of precedents. In order to critique *Citizens United*, Teachout first dug deeply into the Founding era. Justice Kennedy's majority opinion in *Citizens United* rejected the government's argument that it had a compelling interest in restricting independent corporate spending on campaigns.<sup>37</sup> Kennedy acknowledged that the government had an interest in combating corruption, but he essentially limited the definition of corruption to quid pro quo exchanges, and he concluded that independent expenditures did not rise to the level of corruption.<sup>38</sup> Teachout's first section makes an originalist argument against Kennedy's conclusion by fleshing out the Founding era's understanding of corruption (and the interests which can limit the reach of the First Amendment).<sup>39</sup> Teachout relies on a series of animated struggles over gifts from the French to American ambassadors, including Benjamin Franklin.<sup>40</sup> Both the Articles of Confederation and Article I, Section 9 of the Constitution restricted the acceptance of foreign gifts.<sup>41</sup> Even though gifts are not the same as campaign donations, Teachout effectively uses these anecdotes to illuminate the Founding generation's "fixation" with the problem of corruption and influence through the exchange of gifts and money.<sup>42</sup> Teachout offers a rich background from European history, and from English and American interpretations of European history, to show that the Framers understood how public virtue was vulnerable to corruption through self-interest and materialism and how they hoped to protect virtue with structural rules.<sup>43</sup> She uses English political history and European intellectual history to establish this frame of mind circa 1787.<sup>44</sup> Teachout focuses more on the Framers' intent, even though more recent theories about originalism have focused on "original public meaning,"<sup>45</sup> by reading popular debates in the press. Nevertheless, these early chapters on the Framers are concise and effective at raising historical objections to Justice Kennedy's definition of corruption.

Unlike so many originalist projects, Teachout fills in the history between then and now with well-chosen episodes and colorful characters. Her new interpretations of those evolutionary steps are novel, significant contributions. Her discussion of the Yazoo land-selling scandal of the 1790s shows that the Founding generation struggled with how to define

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37. See *Citizens United v. FEC*, 558 U.S. 310, 359 (2010); see also TEACHOUT, *supra* note 6, at 32–55.

38. See *Citizens United*, 558 U.S. at 359.

39. See TEACHOUT, *supra* note 6, at 17–80.

40. See *id.*

41. See U.S. CONST. art. I, § 9; ARTICLES OF CONFEDERATION of 1781, art. VI; TEACHOUT, *supra* note 6, at 20, 26–27.

42. See TEACHOUT, *supra* note 6, at 28.

43. See *id.* at 30–31.

44. See *id.*

45. Jack M. Balkin, *The Construction of Original Public Meaning* (Yale Law Sch., Public Law Research Paper No. 551) (book forthcoming 2016).

corruption and how to remedy it.<sup>46</sup> In *Fletcher v. Peck*,<sup>47</sup> the Marshall Court tolerated the selling of land that had originally been the product of quid pro quo corruption in the Georgia legislature and even exercised judicial review to overturn the following legislature's effort to address the corrupt dealings.<sup>48</sup> Thus, even the Founding generation did not aggressively rely on corruption as a government interest in trumping contract rights and private reliance interests. The next chapters show how antebellum Americans also struggled with providing remedies for corruption—more often than not leaving it unremedied and unprosecuted. Teachout's book is accordingly balanced as opposed to one-sided.

The book is not conceived as a history with new archival sources, as legal theory, or as a policy paper. Its strength is in its powerfully argued narrative over the entirety of American history, synthesizing many different strands of recent work in legal, political, and intellectual history. At the same time, she offers original legal and historical research at key moments.<sup>49</sup> Her legal history has powerful relevance to contemporary legal debates.

## II. WILLIAMS-YULEE: A CRACK IN THE DAM OF *CITIZENS UNITED*?

In *Citizens United*, as discussed above, the Court ruled that the only “sufficiently important governmental interest in preventing corruption or the appearance of corruption” is one that is “limited to quid pro quo corruption.”<sup>50</sup> Justice Kennedy, writing for a five person majority, explained that the government interest in combating appearances of corruption was sharply limited:

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption . . . . The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy . . . . The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.<sup>51</sup>

In *Citizens United*, the Court distinguished *Caperton v. Massey Coal Co.*,<sup>52</sup> in which a litigant had spent \$3 million to defeat an unsympathetic judge and elect a more sympathetic judge when his multimillion-dollar case was pending.<sup>53</sup> In *Caperton*, there was a legal cost as well as a financial cost to such spending: the victorious judge had a duty to recuse himself from the case. In *Citizens United*, the Court explained that *Caperton*

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46. See TEACHOUT, *supra* note 6, at 81–101.

47. 10 U.S. 87 (1810).

48. See TEACHOUT, *supra* note 6, at 81–101; see also *Peck*, 10 U.S. at 133–34.

49. See, e.g., TEACHOUT, *supra*, note 6 (discussing use of the word “corruption” in the Founding debates and the use of the phrase quid pro quo in legal precedents over two centuries).

50. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

51. *Id.* at 359–60.

52. 556 U.S. 868 (2009).

53. See *id.* at 869.



is not to the contrary. . . . The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge . . . . *Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.<sup>54</sup>

But a case from the most recent Supreme Court Term was indeed to the contrary. In *Williams-Yulee v. Florida Bar*,<sup>55</sup> the U.S. Supreme Court considered the Florida Supreme Court's rule prohibiting judicial candidates from soliciting money directly.<sup>56</sup> Accordingly, the Florida Bar disciplined a judicial candidate for mailing and posting online a letter asking for campaign funds.<sup>57</sup> The Court upheld this ban in a five-to-four decision, authored by Chief Justice John Roberts.<sup>58</sup> Chief Justice Roberts revived the significance of appearances, beyond the Roberts Court's previous narrow focus on quid pro quo bribery. Roberts explained that the states can curtail the First Amendment in order to guard against the appearances of bias, influence, and impropriety.<sup>59</sup>

In *Caperton*, Justice Kennedy was the fifth vote for a recusal rule for substantial donors who appeared before the judge they supported, while Roberts dissented.<sup>60</sup> And intriguingly, Justice Kennedy ignored the phrase "appearance of bias" and instead crafted a new phrase, "a probability of bias."<sup>61</sup> As I have argued before, this switch was a mistake in terms of precedent, doctrine, and policy.<sup>62</sup> Justice Roberts returned to a traditional emphasis on appearances, quoting Justice Frankfurter: "Justice must satisfy the appearance of justice."<sup>63</sup> He continued in the same vein later in the opinion, writing, "[I]t is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors."<sup>64</sup> Justice Roberts continued: "As the Supreme Court of Oregon explained, 'the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.'"<sup>65</sup> From the problem of appearances and spectacles of influence, he concluded that Florida was addressing a compelling state interest of untoward appearances: "Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the

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54. *Citizens United*, 558 U.S. at 354–55.

55. 135 S. Ct. 1656 (2015).

56. *See* Fla. Bar v. *Williams-Yulee*, 138 So. 3d 379, 384 (Fla. 2014).

57. *See id.* at 388–89.

58. *See Williams-Yulee*, 135 S. Ct. at 1667–71.

59. *See id.*

60. *See Caperton v. Massey Coal Co.*, 556 U.S. 868, 390 (2009).

61. *See id.*

62. *See generally* Jed H. Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DEPAUL L. REV. 529 (2010).

63. *Williams-Yulee*, 135 S. Ct. at 1670.

64. *Id.* at 1658.

65. *Id.* at 1672 (citing *In re Fadeley*, 310 Or. 548, 565 (1990)).

judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.”<sup>66</sup> In these passages, Justice Roberts adopts the more systemic and institutional approach to the problem of corruption. He refuses to apply the “crabbed” interpretation of corruption as limited to quid pro quo or its appearance.<sup>67</sup> He focuses on the broader problems of influence—“fear [and] favor”—and the general dynamics of integrity and public confidence.<sup>68</sup> In this case about judges, he adopts the Framers’ (and Teachout’s) understanding of public corruption, rather than the *Citizens United* definition.

Chief Justice Roberts is unmistakably clear that his concern for appearances of integrity and independence is limited to the judiciary. Chief Justice Roberts states early in his opinion:

Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for public office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.<sup>69</sup>

The compelling interest is limited to “preserving public confidence in the integrity of the judiciary.”<sup>70</sup> Justice Scalia mocks the Chief Justice’s allegiance to “the Brotherhood of the Robe,” carving out special First Amendment rules for judicial candidates because of their unique role.<sup>71</sup>

But might a future Court recognize that there is a vital interest in integrity for all public offices, or a compelling interest in public confidence that legislators and executives are acting fairly and not acting primarily out of fear or favor? The heightened significance of impartiality for judges justifies bans on direct solicitations in their races and not for all races. Nevertheless, the vital importance of integrity—and the appearance of integrity—for all other offices might justify some set of less restrictive speech regulations (not rising to the level of banning solicitations, but instead upholding limitations on corporate donations and independent spending). *Williams-Yulee* opens the door to such a debate about a range of interests in public confidence in our democratic institutions and, accordingly, a broader range of campaign finance regulations. A future justice might agree with Scalia’s critique of Roberts’s “Brotherhood of the Robe” and might agree with Scalia that judges are not so fundamentally different from other elected officials.<sup>72</sup> But instead of Justice Scalia’s application of this equivalence—to strike down campaign finance restrictions for all judges and all other officials—this future justice might

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66. *Id.* at 1664.

67. *See id.* at 1660–68.

68. *Id.* at 1660.

69. *Id.* at 1662.

70. *Id.* at 1659–60; *see also id.* at 1659 (describing the vital interest in *Caperton* as “safeguarding ‘public confidence in the fairness and integrity of the nation’s elected judges’” (citation omitted)).

71. *Id.* at 1673.

72. *Id.* at 1682 (Scalia, J., dissenting).

extend *Williams-Yulee*'s value of the appearances and public confidence in integrity of all offices and would be the fifth vote needed to overturn *Citizens United*.

### III. HYDRAULICS OF MONEY AND REFORM

Several scholars have compared campaign finance reform to hydraulics. Money in politics is like water: if you build a dam in one place, the water will find another way to flow downhill. In the most famous discussion of this metaphor, *The Hydraulics of Campaign Finance Reform*, Samuel Issacharoff and Pamela Karlan explain:

Our account, then, is "hydraulic" in two senses. First, we think political money, like water, has to go somewhere. It never really disappears into thin air. Second, we think political money, like water, is part of a broader ecosystem. Understanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole.<sup>73</sup>

Their point is that reformers have to think big picture about institutions, power, and deeper political structures. "[E]very reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it."<sup>74</sup> Issacharoff and Karlan offer a few examples related to redistricting and gerrymandering,<sup>75</sup> but their strongest example is the failure of the Federal Election Campaign Act Amendments of 1974 to reduce the role of big donors.<sup>76</sup>

It turns out that campaign finance offers an even more powerful historical example of water finding new paths downhill when dams block the old path. For most of the nineteenth century, the structure of American campaign finance was a direct and open system of officeholder patronage kickbacks, called "assessments." Party officials demanded assessments—cash payments as a percentage of one's salary—from public employees who got their jobs through party allegiances.

The original two-party system's coalitions ran on the spoils system, and they "were held together 'only by the cohesive power of public plunder.'"<sup>77</sup> Party machines got party leaders into office, and then those officers rewarded their machines and supporters by appointing them to lucrative

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73. See Issacharoff & Karlan, *supra* note 9, at 1708.

74. *Id.* at 1705.

75. See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986). But see 42 U.S.C. §§ 1973–1973b-1 (1994); *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004); *Shaw v. Reno*, 509 U.S. 630, 648 (1993); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 167 (1977). See generally Reynolds v. Sims, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1993).

76. 2 U.S.C. §§ 431–56 (1994).

77. KURT HOHENSTEIN, COINING CORRUPTION: THE MAKING OF THE AMERICAN CAMPAIGN FINANCE SYSTEM 15 (2007) (quoting RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900 17 (2000)).

government offices.<sup>78</sup> The assessment system “became the most important financial source for campaign contributions.”<sup>79</sup> A Pennsylvania example of an assessment form letter demanded: “Two percent of your salary is \_\_\_\_\_. Please remit promptly. At the close of the campaign we shall place a list of those who have not paid in the hands of the head of the department you are in.”<sup>80</sup> Many assessments were in the range of 10 to 12 percent of one’s salary.<sup>81</sup> The federal government expanded enormously during and after the Civil War,<sup>82</sup> and the assessments on federal officeholders “provided the main and steadiest source of campaign contributions.”<sup>83</sup> However, the growth of the size of government during the Civil War and Reconstruction also drew more attention to the size of budgets and the growth of taxes. These changes drew more public attention and more public criticism of waste and corruption.<sup>84</sup>

Reformers passed three major statutes prohibiting assessments<sup>85</sup>: the Naval Appropriations Act of 1867, the 1876 Anti-Assessment Act, and the Pendleton Act of 1883, which created the federal government’s first major civil service reforms.<sup>86</sup> From 1876 to 1883, political assessments “declined precipitously.”<sup>87</sup> The Anti-Assessment legislation led to a “sea change in the manner in which political parties would raise and spend campaign funds.”<sup>88</sup> Public opinion had demanded budget cutting, and congressmen saw easy cuts in government salaries. If federal officials were only taking home 80 to 90 percent of their salary due to assessments, then they knew they could abolish assessments, cut salaries by 10 to 20 percent, and the officials would be left with the same take-home pay.<sup>89</sup> But reform is slow and easily evaded: the Anti-Assessment Act was not enforced for six years.<sup>90</sup> Then the assassination of President James A. Garfield in 1881 by a spurned office seeker shocked the nation, focused attention on the patronage/corruption problem, and changed public opinion. Newly elected President Chester A. Arthur suddenly changed his policy from pro-

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78. *See id.*

79. *Id.* at 19; *see also* ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883* 2–5 (1961); E.L. Godkin, *The Democrats and Civil Service Reform*, *THE NATION*, Dec. 2, 1880, at 388.

80. GEORGE THAYER, *WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT* 38 (1973).

81. *Id.*

82. *See* HOHENSTEIN, *supra* note 77, at 14; MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 239 (1977).

83. HOHENSTEIN, *supra* note 77, at 15.

84. *Id.* at 13–15; *see also* THAYER, *supra* note 80, at 38–40. *See generally* HOOGENBOOM, *supra* note 79.

85. HOHENSTEIN, *supra* note 77, at 16.

86. *See id.* at 13–62; HOOGENBOOM, *supra* note 79, at 198–252; RAYMOND J. LA RAJA, *SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM* 17–26 (2008).

87. *See* HOHENSTEIN, *supra* note 77, at 24; *see also* HOOGENBOOM, *supra* note 79, at 225–26.

88. *See* HOHENSTEIN, *supra* note 77, at 13–14.

89. *Id.* at 21.

90. *See* HOOGENBOOM, *supra* note 79, at 226.

patronage to pro-reform, and the Republicans in Congress worked with the reform wing of the Democratic Party to pass the Pendleton Act.<sup>91</sup> The Pendleton Act is known primarily for establishing the first major civil service reforms, but its most powerful change at the time was cracking down even more firmly on political assessments.<sup>92</sup> “The post-Pendleton weaning of the parties from assessment-sourced funding, coupled with the growth and rising influence of national corporations within the political system, by 1896 reshaped the structure of campaign financing that would remain essentially unchanged until 1971.”<sup>93</sup>

These events “caused both political leaders and American businessmen to reexamine their role in national campaign finance issues.”<sup>94</sup> As assessments disappeared, the costs of elections were simultaneously accelerating in the 1880s and 1890s. Corporate spending replaced the assessments and led to the modern campaign finance system.<sup>95</sup> The decline on assessments coincided with sudden increase in corporate power. The industry took advantage of the changes to dominate party politics. Both Democrats and Republicans depended on corporate spending, and legislators developed strategies to target businesses for donations.<sup>96</sup> The “squeeze bill” or “frying the fat” was a way for legislators to hold corporations’ feet to the fire and fry the fat out of them with threats of hostile legislation.<sup>97</sup> Party bosses bargained to ditch the bills only once the targeted businesses donated money.<sup>98</sup> But as businesses paid more and more money to parties, they gained the upper hand in being able to control the parties.

Crony patronage transformed into crony capitalism. The 1884 election was significant in how both parties’ presidential candidates pursued the support of big business and the robber barons.<sup>99</sup> In 1888, Republicans had an advantage in corporate donations, but the Democrats competed evenly.<sup>100</sup> The 1896 election was the peak of corporate involvement; it is an election that stands out as the most expensive election in American

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91. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

92. See THE REGULATION AND IMPROVEMENT OF THE CIVIL SERVICE, S. REP. NO. 46-872 (1881); HOHENSTEIN, *supra* note 77, at 25, 27; see also HOOGENBOOM, *supra* note 79, at 245–46; KELLER, *supra* note 82, at 243; Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 303 (1959); *Reform Cheap for Cash*, N.Y. TIMES, June 9, 1876, at 4.

93. See HOHENSTEIN, *supra* note 77, at 48.

94. See *id.* at 14; see also HOOGENBOOM, *supra* note 79, at 195–97; cf. Dean McSweeney, *Parties, Corruption, and Campaign Finance in America*, in PARTY FINANCE AND POLITICAL CORRUPTION 37, 54–59 (Robert Williams ed., 2000); ROBERT D. MARCUS, *GRAND OLD PARTY: POLITICAL STRUCTURE IN THE GILDED AGE, 1880–1896* 59–100 (1971); PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 110–11 (1958). See generally MARK WAHLGREEN SUMMERS, *THE ERA OF GOOD STEALINGS* (1993).

95. See HOHENSTEIN, *supra* note 77, at 31.

96. See *id.*; THAYER, *supra* note 80, at 46.

97. See HOHENSTEIN, *supra* note 77; THAYER, *supra* note 80, at 46.

98. See THAYER, *supra* note 80, at 46–50; HOHENSTEIN, *supra* note 77, at 13–16.

99. See HOHENSTEIN, *supra* note 77, at 30–37.

100. See THAYER, *supra* note 80, at 39–40.

history (and by far the most expensive as a matter of per capita spending or as a percentage of gross domestic product).<sup>101</sup> Political financier Mark Hanna raised \$3.5 million for William McKinley, and McKinley's total was almost \$7 million, compared to the mere few hundred thousand raised for William Jennings Bryan.<sup>102</sup> Ever since the elections of the 1880s and 1890s, large donations from special interests have been the foundation of the American campaign finance system. One scholar observed that the campaign finance system underwent one of its most significant changes in the 1880s and 1890s and then once again in the Watergate era of the mid-1970s.<sup>103</sup>

The Articles in this symposium reflect this same problem of hydraulics. Again, once you stop money at one source, it finds another way to flow into the political system. Richard Hasen takes up Teachout's claim that campaign contributions start a slippery moral slope toward bribery and cause criminal corruption. Hasen critiques this link, noting that there are relatively few corruption cases in Congress and that there seems to be no correlation between the level of caps on individual donations and the amount of corruption. Instead, Hasen suggests that the rate of corruption is correlated to the distance of the state capital from the state's media center. Hasen's explanation is that when a state capital is more distant from the state's major city and media center, this remoteness gives politicians more of a sense of being insulated from scrutiny, which leads them to engage in more and more corruption. If this dynamic is true, it is a great example of reform efforts backfiring. For the national capital, the Founders chose not Philadelphia, New York, or Boston, but instead, they chose a swamp resting between Maryland and Virginia. The chief explanation for this placement in the South was that the first Congress needed to coax the South into a compromise on state debts. But the early Republic's leaders also wanted the capital to be independent from any one state, and they wanted the capital to be insulated from the influence of major commercial centers. This compromise in 1790, with the goal of appeasing Southern politicians, placed the capital far from the Northern centers of commerce and outside Southern cities, too—a swampy blank slate free of preexisting influences. Note, too, how so many states chose capitals far away from the state's commercial, financial, and cultural centers. This is one reason why memorizing state capitals was such a challenge in elementary school. Many state capitals were purposely obscure: Albany, rather than New York; Harrisburg, rather than Philadelphia; Columbia, rather than Charleston; Hartford, rather than New Haven; Annapolis, rather than Baltimore; Baton Rouge, rather than New Orleans; Sacramento, rather than San Francisco or Los Angeles; et cetera. If the

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101. See Matthew O'Brien, *The Most Expensive Election Ever: . . . 1896?*, THE ATLANTIC (Nov. 6, 2012), <http://www.theatlantic.com/business/archive/2012/11/the-most-expensive-election-ever-1896/264649/> [<http://perma.cc/XRZ7-MSZT>]. These figures are based on adjusted dollars to present value, based on percent of gross domestic product and/or per capita spending.

102. HOHENSTEIN, *supra* note 77, at 60.

103. See *id.*

leaders in these states hoped that distant commercial powers would insulate officials from corruption, then Hasen's findings may suggest that the insulation backfired: distance created a feeling of protection from media scrutiny and promoted a culture of corruption.

Hasen's Article relies on a study by Harry Enten on patterns of corruption in the states.<sup>104</sup> Enten's research also points to another mismatch between legal reform and the reality of corruption<sup>105</sup>: states with the strictest ethics laws often have the highest number of official corruption cases. Why? The causal arrows are reversed: ethics laws do not decrease a culture of corruption; rather, a culture of corruption triggers a response of enacting more ethics laws, which do not actually change the culture. The money still flows despite reform.

Another example of anticorruption efforts backfiring appears in Jay Holtmeier's Article on cross-border corruption enforcement. When one nation has clear and predictable anticorruption laws, many corporations will self-report violations in order to offer up cases involving corrupt individuals and to avoid larger punishments for the entire corporation. One might think that multiple nations cracking down on corruption would increase compliance; on the contrary, the gaps between different nations' legal definitions of corruption and the lack of predictability have a chilling effect on self-reporting. Other Articles in this symposium reflect a different kind of hydraulics: corruption as market competition<sup>106</sup> and as supply and demand.<sup>107</sup>

Perhaps the most troubling example of the hydraulics of campaign finance is in Albert Alschuler's Article. Alschuler argues that criminal prosecution is a deeply flawed way of cracking down on political corruption. The definitions of corruption have become too broad, leading to a lack of fairness across cases, with too much prosecutorial discretion, whim, and partisan abuse. I suggest that this is another example of hydraulics: demand for reform is also like water. As the Court dams up structural reform of the campaign finance system, the demand for anticorruption flows to other parts of the government. The legislature responds to public frustration, but when those efforts at structural reform are overturned, the next solution is piecemeal, case-by-case targeting of reform, i.e., criminal charges.

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104. See Richard L. Hasen, *Why Isn't Congress More Corrupt?: A Preliminary Inquiry*, 84 FORDHAM L. REV. 429 (2015).

105. Harry Enten, *Ranking the States from Most to Least Corrupt*, FIVETHIRTYEIGHT (Jan. 23, 2015, 7:00 AM), <http://fivethirtyeight.com/datalab/ranking-the-states-from-most-to-least-corrupt/> [http://perma.cc/RT9H-KCEW].

106. Mike Koehler, *The Uncomfortable Truths and Double Standards of Bribery Enforcement*, 84 FORDHAM L. REV. 525 (2015). Koehler observes that U.S. law has a double standard in that it punishes private influence with cash as bribery, but permits government with cash as legitimate foreign policy. I would suggest that one effect of this legal arrangement is that political influence is a kind of market: if a government can eliminate competition from private sources, it increases the relative power of its own public sources.

107. Lucinda A. Low, Sarah R. Lamoree & John London, *The "Demand Side" of Transitional Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015).

Prosecutors—some well-intentioned hydraulic engineers, others exploiting the political situation—overzealously pursue criminal charges. Alschuler rightly notes that prosecution is not a fair or effective way to remedy the deep and muddy problems of influence and special interests in American politics.

United States Attorney Preet Bharara's keynote address focused on prosecution as the remedy for corruption, which is too narrow a view of the systemic problem.<sup>108</sup> Like the Roberts Court and the legal formalists, he portrays the problem of corruption in terms of the "bad folks," who commit fraud, bribe, and break the law, and the good folks, who sometimes fail to report this criminal behavior.<sup>109</sup> Considering Bharara's position as U.S. Attorney, his viewpoint is understandable. But we must keep in mind that corruption does not address the "good folks" who play by the rules, though those rules lead to systemic corruption.

And this brings us back to Larry Lessig's moral qualms. Prosecution is for the truly morally corrupt individuals, for the quid pro quo. For the structural problem of fear and favor, of institutional corruption by design, the solution is structural change. But when the Court puts dams in front of structural change, we are left with the powerful hydraulic waves finding other channels for reform. We get stuck thinking that corruption is a matter of evil and criminal law. And the courts' legal dams in constitutional law create unintended consequences of injustice, the unfair damnation of public officials as criminal defendants. Until we transform our understanding of corruption from an effort to condemn individuals to an effort to fix with broader institutional reform, we will be out of touch with the Framers' eighteenth-century vision of democracy, and we will be out of luck in the twenty-first century as well.

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108. Preet Bharara, *Keynote Address: Fighting Corruption in America and Abroad*, 84 *FORDHAM L. REV.* 601 (2015).

109. *Id.* at 605.